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U.S. Citizenship
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AUG 03 2004
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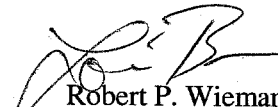
Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Mexican restaurant/taco shop. It seeks to employ the beneficiary permanently in the United States as a taco maker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional evidence and asserts that the continuing ability to pay the beneficiary's proffered wage has been established.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The issue raised on appeal is whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$6.85 per hour, which equals \$12,467 annually, based on a thirty-five hour work week.

The petitioner initially submitted an incomplete copy of the owner's 2001 individual tax return, consisting only of Schedule C, Profit or Loss From Business, as evidence of its ability to pay the proposed annual salary of \$12,467. It shows that the petitioning business is operated as a sole proprietorship and that the owner declared a net business profit of \$24,124 in 2001.

On April 8, 2003, the director instructed the petitioner to submit additional information to support the petitioner's ability to pay the beneficiary's proffered wage. The director requested the petitioner to submit original and complete computer printouts of its tax returns for the year 2001 to the present, date-stamped by the Internal

Revenue Service (IRS). The director also observed that Part B of the ETA-750 indicated that the petitioner had employed the beneficiary since 1997. He requested the petitioner to also provide a copy of the beneficiary's Wage and Tax Statements (W-2s) for 1997 through 2002.

In response, the petitioner, through counsel, submitted copies of the sole proprietor's 2001 and 2002 individual tax returns, but did not submit the requested IRS printouts of the tax returns or copies of the beneficiary's W-2s. The 2001 tax return reflects that the sole proprietor filed jointly with his spouse and declared two dependents. It also shows that he reported an adjusted gross income of \$22,419, including the previously reported business income of \$24,124, as shown on Schedule C. The 2002 individual tax return shows that the sole proprietor filed jointly with his spouse and listed three dependents. He declared an adjusted gross income of \$26,080, including a business income of \$25,181.

The petitioner additionally included copies of the beneficiary's individual tax returns for 1997 and 1998. By letter dated June 30, 2003, counsel states that the beneficiary was never issued a W-2 because he did not possess a social security number, but filed his income taxes showing income earned in the United States. Counsel asserts that the petitioner has paid the beneficiary more than the proffered wage. Counsel also submits a letter, dated June 25, 2003, from a tax service firm, asserting that the petitioner's business will continue to prosper due to efficient management.

The director issued a notice of intent to deny on July 30, 2003, advising the petitioner that it had failed to submit all of the evidence requested. The director reiterated that he is requesting the petitioner's IRS computer printouts of tax returns for 2001 and 2002. The director advised the petitioner that it had an additional thirty days to submit additional information, arguments, or evidence to support the petition.

In response to the director's notice of intent to deny the petition, counsel again submitted copies of the sole proprietor's individual tax returns for 2001 and 2002 and a copy of the previously submitted letter from the tax service firm. Counsel also offered a one-page IRS printout, dated June 25, 2003, which related to the individual tax returns filed by the petitioner, but did not contain any specific financial data. Counsel further submitted copies of the beneficiary's individual tax returns for 1997 through 2001.

The director subsequently denied the petition on November 22, 2003, determining that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of the visa petition because it had not submitted the requested IRS printouts.

On appeal, counsel maintains that the petitioner complied with the director's request for evidence in good faith and had submitted the only print-out that the local IRS would provide at the time, as well as submitting copies of the owner's tax returns for 2001 and 2002, signed by the sole proprietor and the tax preparer service. Counsel states that after receiving the director's final decision denying the petition, the petitioner again requested the IRS to provide another computer record of the petitioner's tax returns. Counsel includes an affidavit by the sole proprietor describing his original efforts to obtain the correct computer record from the IRS office. Counsel also provides the December 2003 IRS response to the petitioner's second request for copies. The financial data provided in these documents, submitted on appeal, is consistent with the sole proprietor's financial declarations reflected on the tax returns previously submitted to the record.

A sole proprietorship is not legally separate from its owner. As the petitioner is a sole proprietor, his income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses

generated by the sole proprietor and his dependents must be reviewed when determining his continuing ability to pay the beneficiary's proposed annual salary of \$12,467. He must be able to demonstrate that he can sustain his household living expenses as well as pay the beneficiary's proposed salary. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983). If a petitioner can provide persuasive evidence that it has paid wages to the beneficiary, such as W-2s, state wage reports, or credible payroll records, then such wages can be credited to the calculation.¹ If the petitioner's remaining income is sufficient to cover his household living expenses, then the ability to pay the proffered wage is demonstrated.

In the instant case, the director denied the petition based solely on the petitioner's failure to provide IRS computer records of the sole proprietor's tax returns. The director's decision fails to articulate why such records were requested in lieu of consideration of the tax returns provided by the petitioner. Although, as provided in 8 C.F.R. § 204.5(g)(1), a director has discretion in individual cases, in general, ordinary legible photocopies of pertinent evidence is sufficient for the initial filing and approval of an employment-based immigrant petition. The AAO finds that to make such requests for IRS records routine in adjudications of immigrant visa petitions, would place an undue burden upon the applicants and invite unnecessary delay. Here, the director also failed to request the petitioner to provide a summary of the sole proprietor's household expenses during the relevant period and failed to address the financial information that the petitioner did provide.

Therefore, in view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence relevant to the sole proprietor's household expenses as well as any further pertinent financial information related to the petitioner's continuing ability to pay the proposed salary. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

¹ A wage-earning beneficiary's individual tax returns, standing alone, do not identify that a particular petitioner or employer has paid wages to a specific beneficiary. Simply going on record without documentary evidence is not sufficient to meet a petitioner's burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).